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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STARLA MABIN, Plaintiff and Appellant, v. KINDRED HEALTHCARE OPERATING, INC. et al., Defendants and Respondents.	B265712 (Los Angeles County Super. Ct. No. BC525172)

APPEAL from a judgment of the Superior Court of Los Angeles County, Suzanne G. Bruguera, Judge. Affirmed.

Gurvitz, Marlowe & Ferris, J. Scott Ferris and Martha D. Henderson, for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Barry S. Landsberg, Andrew L. Satenberg, Joanna S. McCallum, Luke L. Punnakanta, for Defendants and Respondents.

A human resources employee brought an action for

harassment because of race under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] based primarily on employee complaints that she reviewed in the course and scope of her employment. Her employer and her former supervisor filed a motion for summary judgment, which the trial court granted on the ground that the conduct at issue was not so severe or pervasive as to alter the terms and conditions of employment and create an abusive work environment. On appeal from summary judgment, the employee contends a triable issue of fact exists as to whether the harassment that she experienced was sufficiently severe or pervasive as to create a hostile work environment, which the employer failed to correct. We hold that the complaints received by the human resources employee in this case, which other employees brought to her attention in the regular performance of their job duties, did not constitute harassment of the human resources employee. Her supervisors' inaction did not constitute harassment. The remaining conduct at issue was not so severe or pervasive as to alter the terms and conditions of employment.

The employee additionally contends on appeal that: the hostile work environment constituted an adverse employment action which supports her cause of action for discrimination based on race; her supervisor's failure to investigate complaints brought to his attention and his prevention of her investigation into complaints constituted outrageous conduct that caused her to suffer emotional distress; and a reasonable person in her position would have been forced to resign. Because there is no triable issue of fact as to harassment, it follows that there is no

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[1] All further statutory references are to the Government Code, unless otherwise stated.

triable issue as to whether the employee suffered an adverse employment action based on harassment. The supervisor's conduct was not outrageous, and a reasonable person in the employee's position would have felt she had reasonable alternatives to resignation. We affirm.[2]

FACTS AND PROCEDURAL BACKGROUND

Undisputed Facts

Defendant and Respondent Kindred Healthcare Operating, Inc. (KHOI) is the parent company of KND Development 53, LLC, doing business as Kindred Hospital South Bay (Kindred). Kindred operates a hospital in Gardena (South Bay) and another in Hawaiian Gardens (Tri-City). Defendant and respondent Kevin Chavez was Kindred's Chief Executive Officer. Jeffrey Sopko was Kindred's District Director of Human Resources for the Southern California area. Chavez and Sopko interviewed plaintiff and appellant Starla Mabin for the position of Human Resources Coordinator and hired her on July 21, 2011. She reported directly to Chavez and Sopko, who were her supervisors. Her primary work location was South Bay, but she worked at Tri-City as needed, typically once or twice a week.

One of Mabin's responsibilities was to verify the certification and licensure of the hospital's medical staff, which included asking employees about their licenses. If an employee was not licensed, the employee was removed from the schedule

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[2] Because we affirm on the merits, we do not address respondents' contention that the employee did not work for respondent employer.

immediately until the license was brought current. Mabin worked with the hiring manager for the department to make sure licenses were current.

Mabin also made sure that employees complied with the hospital's policies and procedures. Mabin investigated employee complaints, including complaints of harassment and discrimination. She was required to advise Chavez of any complaints made by employees. Chavez expected Mabin to have expertise in the area of harassment and discrimination. He would meet with her to understand the nature of an employee's complaint and her plan to address it. If she did not feel confident about how to proceed, she could request additional resources from Chavez or the management company. Mabin could also request that the management company conduct the investigation of a complaint for harassment or discrimination. Mabin was required to write a complaint report after each incident, including notes from her investigation.

When Mabin was hired, the acting chief operating officer was a Filipino nurse named Patty.[3] In Patty's office, Patty told Mabin that she did not understand why Chavez hired Mabin and she was not going to take directives from her. Patty referred to Mabin as "a little gal" and said Mabin could not be an authority figure over her. Mabin e-mailed her notes about the conversation, which she considered racially derogatory, to Chavez and Sopko. Patty was not Mabin's supervisor and Mabin did not report to her.

Kindred hired Jude Levasseur as its chief operating officer. Levasseur is Black. After Levasseur was hired, Patty told Mabin in a hallway of the hospital that she was going to quit because

[3] Patty's last name is not part of the record on appeal.

Kindred was hiring too many Black people. She said she was not going to take any authoritative directives from Levasseur or Mabin.

Zenia Empeno was the supervisor of nursing for the evening shift. All Kindred employees, including Empeno, worked at both locations. Levasseur received an anonymous handwritten note dated October 2011. The note stated:

> "Dear Stella,
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> > "I am writing this letter to let you know that Zenia Empeno supervisor said in my language that she is mad that they hire you [Stella] HR lady. Zenia said in my language that she hate black people and she is going to get all black people [fired] or make them quit. Stella you is a nice lady. She do good stuff for everyone[. T]his is a different better place since she came to work here. Zenia was saying that we never had black people in charge and stated she is going to have people sign a thing to get Stella out of [here] and get a new person [that's] our race or white person in here to work.
> >
> > "All the employees are scared of Zenia [because] she always say [*sic*] nothing is going to happen to her either because they have the Phillipino [*sic*] Maphia [*sic*] here at this place and she want it to be all of us again and no more black people. She said you guys are all ugly niggers and you need to go. We like you but be careful with her[. P]lease watch yourself."

At some point, Levasseur brought the note to the human resources office and gave it to Mabin in her capacity as human resources coordinator.

On October 21, 2011, Mabin was treated at the hospital for an episode of syncope and a possible seizure related to stress. She missed work, causing her 90-day probation period to be extended. She also missed work in November due to illness. When Mabin's 90-day evaluation was completed, Chavez's comments were positive. He stated, "Starla has done an outstanding job, she's organized, bright and brings enthusiasm to both South Bay and Tri-City. Starla has been an excellent addition to our family."

Mabin and Levasseur placed a Filipino nurse on modified duty in the kitchen. The nurse complained that the work was outside her job description and accused them of harassment and racism. The company's corporate office investigated the nurse's complaints. Chavez said the nurse sent an extortion letter to the hospital, but the investigation had revealed Levasseur and Mabin had done nothing improper.

On March 26, 2012, Levasseur received an anonymous note addressed "To Mr. Jude," in handwriting different from the previous note. The note stated:

> "I was told yesterday at about [7:30 p.m.] that Zenia the Night Supervisor is organizing the Night Nurses ie the Philippino's [*sic*] are planning to get you and Stalla the HR lady out of this place[. T]hey are making it a secret and also yesterday night Zenia travelled to Phillipines so that no one will know that she is part of the plan to remove black people out of this place. We have known

> peace [and] no discrimination since you got here. Please do something [before] Zenia [and] her group carry out their plan. We like your leadership."

Mabin's name and the word Filipino were spelled incorrectly in both of the anonymous letters. Levasseur gave the note to Mabin in her capacity as human resources coordinator.

On March 27, 2012, Mabin wrote an e-mail to Chavez, Sopko, Kerr, Levasseur, and another employee, as follows:

> "Good afternoon,
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> "Attached is a letter that Jude received under his door from an anonymous employee. Unfortunately, it is very apparent that racism currently exists in the work place. It is also obvious that some of the employees at Kindred definitely don't like change (in more ways than one).
>
> "In the past I have encountered underhanded disrespect from being called a 'lil girl' or that 'gal' from a manager. When I reported the behavior I was simply told to continue to work with her. The employee never received any sort of write up for her behavior.
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> "In the event that someone receives information about me (that may or may not be true) please advise me. In the past we have had an employee make false accusations about me and Jude and the information was sent to Corporate. I come to work only to find out I was being

> investigated because of a complaint from an employee. I have to be honest it didn't make me feel well; knowing I do my best on a daily basis and something simple as a false complaint had my name throughout Corporate in an investigation. The same employee turned around and sent threatening, extortion letters to Kevin. This is an example of the behavior that we deal with sometimes.
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> "I am sending this email because I am not sure what the story is behind it however, in the past when there were lies and drama made up about me it was brushed off or I had to be investigated even though all of the findings were false. The attached letter may be false or an attack against another innocent employee but I feel compelled to disclose it due to my past experiences with employee issues/complaints."

Levasseur and Mabin regularly informed Chavez of nurses and respiratory therapists who had expired licenses. On April 4, 2012, Mabin told Chavez and others that 54 employees' licenses were missing or expired, including Empeno's license. Chavez responded, "This is NOT good . . . I need a timeline of when this will be taken care of!!!" Mabin began meeting with nurses and informing them that they could not be scheduled to work because of their licensing issues. Chavez told her to stop harassing his nurses, not to speak to them, and that he would deal with them.

A few weeks later, Chavez called Mabin into a management team meeting and said he wanted her to work full time at Tri-City, because the employees at South Bay were unhappy with

her. Mabin refused to go there full time, because Tri-City was small and did not need a full time human resources employee. When she said that she would not go, Chavez said he wanted either Mabin or her assistant Sharon Allen to go to Tri-City. Mabin said she would contact the nurse manager at Tri-City to inquire whether Tri-City needed a full time human resources employee. The nurse manager said they did not. Mabin also reported Chavez's request to Sopko. Sopko agreed with Mabin and refused to approve the location change.

On April 20, 2012, Mabin sent an e-mail to Chavez, Levasseur, Sopko, and another employee stating, "Good morning gentlemen, [¶] Kevin[,] you asked me to speak with Jeffrey in regards to (me or Sharon) having someone from HR work at Tri City five days per week. Jeffrey did not approve your request." She apologized for not notifying him earlier in the week. Chavez responded, "I have concerns about not having regular presence at Tri City. I will discuss with Jeffrey my concerns the next time I see him." Mabin added, "I work at Tri City two days per week[. H]owever, I understand the concerns."

Mabin sent another e-mail to Sopko stating, "if the decision is made to move one of us (me or Sharon) to Tri City I am not going to agree to go. I was hired to work at South Bay and travel to Tri City as needed." She explained that Tri-City was too far from her house. She stated, "I am glad that I have a job and love working in H.R. 95% of the employees at Kindred South Bay and Tri City will say great things about me and my work ethics . . . . because I do my job. I like working here at Kindred but I will quit if I am forced to go to Tri City." She added, "According to the letters that was recently received; the goal for some employees is to make 'the black managers leave [S]outh Bay' . . . . making me

move to Tri City will give the disgruntle[d employees] just w[h]at they want. Is that the real reason why it is such a big deal to move me to T.C.; to make some of the employee's [*sic*] happy? I have been here for 9 months and now all of a sudden it is a great need to have HR at T.C. full time when only ¼ out of ¾ of the employee's work there?"

Mabin continued to go to Tri-City for the same amount of time as she always had. She was not required to spend any additional time at Tri-City.

Kindred offers tuition reimbursement to employees. Chavez allowed his assistant Denise Arreola to take time off to attend school without having anyone cover her duties. Mabin asked Chavez if she could leave work early one night per week to attend school for her master's degree. She explained that her assistant was willing to work late to cover the two-hour absence. Chavez refused Mabin's request to leave work early to go to school and would not sign the paperwork. Mabin sent an e-mail to Sopko informing him that Chavez denied her request. She accused Chavez of treating her unfairly, because other people were able to go to school and she was not. Sopko did not respond. Chavez's assistant Denise Arreola was the only person Mabin was aware of whom had been permitted to take time off for school. He allowed Arreola to do a lot of things that no one else was permitted to do.

Mabin was so unhappy working for Kindred that she began looking for new employment in June or July 2012.

Employees at Kindred often held morning prayer sessions. One day in August, as Mabin approached the prayer circle, she overheard a Filipino nurse say in reference to Black employee Deborah Spencer, "I don't want to hold her hand. You know, I

don't like black people, I don't want to hold her hand." The Filipino nurse walked away from Spencer and grabbed another employee's hand.

Spencer immediately reported the remark to Mabin, in her capacity as the human resources coordinator, and she provided a written complaint dated August 28, 2012. It was Mabin's responsibility as human resources coordinator to speak to any employee who made a racially derogatory comment. Mabin, in her role as the human resources coordinator, spoke to the nurse. Mabin explained that the comment could be considered discriminatory and the nurse could not discriminate against someone because of race or religion. The nurse did not want to listen and walked away. Mabin wrote a report about the complaint. She felt she addressed the situation effectively, and she is not aware of any racially derogatory comments by the nurse after Mabin counseled her. Spencer did not report any further problems.

On September 4, 2012, Mabin sent an e-mail to Arlene Rico, Levasseur, Sopko, and Chavez, as follows:

> "I received another complaint against night supervisor, Zenia. The employee stated Zenia told her it appeared that she is always mad and mean. According to the employee Zenia said, 'people like you are always mad and I know your type.' Zenia also told the employee that I know how to get people fired and you can remember it, write it down and sleep on it! The employee was very upset and stated she didn't know what Zenia meant when she stated people like you and your type. The employee is a new CAN and has been

with Kindred for a few months.

> "I have had numerous complaints about Zenia and her level of professionalism. All of the complaints have come from African American employees. Zenia is also the same young lady that wrote the petition that stated she wanted me and Jude to leave the facility because we were 'Black' and she didn't think blacks should be in charge.
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> "I have had enough of her [antics] and attitude. I am going to speak with her this week. Any other company she would have been terminated or at least investigated but nothing was ever said to her about her unprofessional behavior and to make matters worse that is the night supervisor . . . . . ."

On September 5, 2012, Mabin wrote an e-mail to Chavez and Levasseur. She reported that Rico had allowed Empeno to take leave for months without telling Mabin and had covered it up. Mabin did not know Empeno was absent until another supervisor asked about her. Mabin stated that Rico should be required to counsel Empeno even though it was the first occurrence. Chavez promised to meet with Mabin to discuss the situation.

Chavez made positive comments in Mabin's annual performance evaluation. He stated, "Starla has demonstrated good effort in keeping workplace injuries at a minimum by ensuring staff is wearing correct shoes and using the buddy system. She strives to do her best in all areas of the Human Resources department. [¶] Starla has met expectations by

rebuilding the HR department at South Bay and Tri City. She is a good face to a credible HR department." The review was signed by Chavez and Mabin on September 20, 2012.

Mabin was earning $50,000 from Kindred. She received an offer of employment from New Directions for Veterans to work as Director of Human Resources at an annual salary of $80,000. On September 20, 2012, after she received the offer from New Directions, she sent an e-mail to Chavez, Sopko, Levasseur, and Allen, with an attached letter that stated:

> "I am writing to inform you that I am resigning from my position as Human Resource [*sic*] with Kindred Healthcare, Inc. (South Bay [and] Tri City hospitals). My last day of employment will be October 01, 2012.
>
> "I would like to address my concerns regarding leadership and counsel during my stay with Kindred Healthcare, Inc. South Bay and Tri City. I have been very uncomfortable working at Kindred hospital. I never felt equality in the workplace. I actually found it extremely difficult to perform my duties as a Human Resource [*sic*] because of all the favoritism and racism that continues within the hospital. I have addressed the issues many times during my year of employment.
>
> "I appreciate the opportunities I have been given during my time with Kindred. I hope that you are satisfied with my work performance and can accept this letter."

Sopko responded by e-mail, "What? Give me a call asap at 714-334-6097 please. We have some alternatives . . ." Sopko offered to move Mabin to another location if she was unhappy, but she felt changing locations would give the impression that it was acceptable to discriminate and harass women. She also did not feel comfortable with the proposed location, because Chavez knew the chief executive officer of the hospital.

On September 25, 2012, nurse Nikki Ogbodo found a typed anonymous note on her desk which stated as follows:

> "Nikki Ogbodo this is for you please don't throw it away.
>
> "I want to tell you in confidence to be careful with [M]s. Zenia the night [s]upervisor[. S]he said in my language that she hates you and will make sure that you [leave] this hospital, she said you have so much confidence in you, but she just don't like you, that she will do anything to see that you are fired. She said this at night shift. She don't like a lot of you guys (black people) but Nikki, Christina and Lynda she said call their names, but Nikki is the worst. She also said She don't like Jude and Starlat and Arlene.
>
> "I want you to know this because I like you. You have helped me a lot. You are a good nurse. So beware of Zenia and keep doing a good work. Whenever you work and she come to work, she always check your chart to see if you don't give medicines or something I don't know but be careful with her.

> "I don't want to tell you who I am because she will make sure I am fired too."

Ogbodo gave the note to Levasseur and Mabin, as the human resources coordinator. Mabin spoke with Ogbodo about the note.

Mabin's last day at Kindred was September 27, 2012. Mabin visited a psychiatrist approximately eight times beginning in early 2013. Mabin filed a complaint with the Department of Fair Employment and Housing (DFEH) on July 19, 2013. The DFEH sent her a right to sue letter. In January 2014, New Directions raised Mabin's salary to $88,000.

Allegations of the Complaint

Mabin filed a complaint on October 21, 2013, against KHOI, Chavez, Sopko, Michael Kerr, and Doe defendants for several causes of action, including discrimination in violation of section 12955, hostile work environment in violation of section 12940, intentional infliction of emotional distress, and constructive termination.

The complaint alleged that each Doe defendant was a subsidiary or agent of the named defendants. The named defendants and Doe defendants acted on behalf of, and at the direction of, every other co-defendant, and when acting as principal, was negligent in the selection and hiring of every other co-defendant. All the named defendants and Doe defendants were employees or agents of each of the remaining defendants, were at all times acting within the authorized course and scope of their employment or agency, and all of their conduct was

subsequently ratified by the respective principals.

The complaint described the various incidents in the workplace. The three anonymous letters were given to Mabin in her capacity as human resources coordinator for the purposes of conducting an investigation. KHOI, Chavez, Sopko, and Kerr knew of the harassment due to Mabin's requests to have them investigate the harassment. They discriminated against and harassed Mabin, and as a result she was forced to quit her employment and continues to suffer emotional distress. Mabin was subjected to regular, persistent racial remarks, epithets, and innuendos from KHOI, Chavez, Sopko, and Kerr, as well as by co-workers, based on race. The remarks and conduct created a hostile work environment. The regular, persistent harassment and intimidation was sufficiently severe and pervasive to force Mabin to fear the work environment and quit her employment with KHOI. KHOI, Chavez, Sopko, and Kerr took no corrective action regarding the discriminatory and harassing actions by KHOI, Chavez, Sopko, and Kerr. They failed to undertake an effective, thorough, objective, and complete investigation, and failed to ensure Mabin was not required to work in a hostile environment.

By failing to investigate and stop the harassment, the conduct of KHOI, Chavez, Sopko, and Kerr was extreme and outrageous, intentional and malicious, and done for the purpose of causing Mabin to suffer emotional distress. KHOI, Chavez, Sopko, and Kerr, by ratifying the conduct complained of, knew Mabin's emotional distress would be increased. KHOI, Chavez, Sopko, and Kerr forced Mabin to endure intolerable conditions. At the time of her resignation, Mabin had been repeatedly told to work at a different location. By forcing her to travel long

distances on a daily basis, KHOI, Chavez, Sopko, and Kerr created and knowingly permitted these working conditions to continue. The persistent racial remarks by KHOI, Chavez, Sopko, and Kerr, as well as by co-workers, created a hostile work environment, and in conjunction with the regular, persistent harassment and intimidation that she was subjected to, forced Mabin to fear the work environment and quit her employment with KHOI. Mabin's working conditions were so intolerable that a reasonable person in her position would have had no reasonable alternative except to resign. Due to these working conditions, Mabin resigned on October 1, 2012.

Motion for Summary Judgment and Supporting Evidence

Sopko and Kerr were dismissed from the action at some point during the litigation. On July 17, 2014, KHOI and Chavez filed a motion for summary judgment on the following grounds: KHOI did not employ Mabin; individuals who are not employers cannot be held liable for several of Mabin's claims; Mabin did not suffer an adverse employment action; the harassment alleged in the complaint was not severe or pervasive; Chavez's conduct was not extreme and outrageous; and a reasonable employee in Mabin's position would have reasonable alternatives to resignation.

KHOI submitted the declaration of senior payroll employee Renay Thommen, who declared Mabin was employed by Kindred. Mabin was never employed by KHOI or KHI. Chavez was employed by Kindred from November 2010 to June 2014. He was never an employee of KHOI or KHI.

KHOI also submitted Mabin's deposition testimony. In a

conversation she had with Chavez about the offensive content of the anonymous letters, he disregarded the claims and issues brought to his attention. He said, "Well, that's too bad, you just have to deal with it." Mabin felt his response was tantamount to endorsing the bad behavior.

Mabin does not remember when she received the first anonymous letter. Mabin e-mailed a copy with a cover letter to Chavez, Sopko, Kerr, and Levasseur, but she does not remember when she sent it or what she said in her cover letter. She asked Chavez and Sopko for assistance at some point. She did not conduct any other investigation with respect to the letter, because she felt there was no way to investigate it.

When no action was taken in response to her e-mail, she told Chavez that she was going to speak with Empeno about the issues raised in the letter. Chavez's response was, "Well, I don't want you to harass my nurses." He said "don't harass my nurses" in response to everything. She interpreted his response as a direction not to speak with Empeno about the statements in the anonymous letter. She did not ask Sopko about speaking to Empeno or any other course of action to investigate the anonymous letter. She does not know if anyone ever spoke with Empeno about the issues raised by the letter.

Mabin sent the March 27, 2012 e-mail with a copy of the second anonymous letter to Chavez, Sopko, Kerr, Levasseur, and another employee. She did not take any further action to investigate or respond to the second letter. Asked if she spoke to Empeno about the issues raised in the second letter, Mabin stated that she had already answered the question, but whenever no action was taken, she would tell Chavez that she was going to speak to the nurses herself, and his response was always not to

harass his nurses. KHOI's attorney moved to strike her response and asked her again if she ever spoke to Empeno directly about the statements in the second letter. Mabin replied that she was advised not to. She does not know what action, if any, Chavez or Sopko took in response to the information.

Mabin's September 4, 2012 e-mail to Rico, Levasseur, Sopko, and Chavez stated that she intended to speak with Empeno about comments made to another nurse. After Chavez received the e-mail, he came to Mabin's office and told her not to speak with Empeno. Chavez continually told her not to speak with the staff. Before she sent this e-mail, after this e-mail, and at all times, he told her not to harass his nurses.

Mabin spoke to Ogbodo about the third anonymous letter, but she did not talk to Empeno. She forwarded any letter like this to Chavez and Sopko, so she believes that she sent the third letter to them. She does not remember getting a response from them about the third letter. She does not remember discussing the third letter with anyone else at the company.

Mabin has never heard Empeno make any derogatory remarks. There is no evidence Empeno made any of the statements attributed to her in the anonymous letter. Mabin and Levasseur conducted numerous investigations into employee complaints. Any time Mabin received a complaint, she conducted an investigation, unless Chavez said not to harass the nurses. Mabin believes Sopko, as the district director of human resources, was required to investigate any discrimination or harassment complaint brought to his attention from a human resource coordinator.

In addition to Mabin's deposition testimony, KHOI submitted copies of several documents to support the facts above.

Opposition to Motion for Summary Judgment and Supporting Evidence

On August 14, 2014, Mabin amended her complaint to substitute Kindred in place of Doe defendant 1. Mabin filed an opposition to the motion for summary judgment arguing as follows: the harassment that Mabin experienced, and the failure to investigate the harassment, constituted an adverse employment action; Chavez's instruction not to investigate was discrimination; the conduct that Mabin experienced and Chavez's response constituted racially motivated harassment; Chavez's response was outrageous; Mabin had no choice but to resign her employment; and Mabin had amended the complaint to substitute Kindred as a Doe defendant, so the proper employer was now identified and KHOI could be held liable for Mabin's complaints.

Mabin submitted Chavez's deposition testimony in support of her opposition. Chavez no longer works for Kindred and is employed by another company. He considers the statements in the anonymous letter dated October 2011 to be very offensive. He does not know if Mabin provided him with a copy of the October 2011 letter, but his reaction would have been to meet with Mabin and have her conduct an investigation. He did not have any communication with Mabin about a nurse named Empeno at any time. He never told Mabin to leave Empeno alone. If Mabin were named in an anonymous letter, Chavez would have worked with Levasseur and solicited his opinion, and he would have asked the management company to work with Levasseur directly to conduct an investigation. Chavez does not

recall seeing any of the anonymous letters prior to the litigation. If Mabin received three anonymous letters about possible racism in the workplace, Chavez would expect an investigation to have been conducted.

If an allegation were made that a supervisor was discriminating or harassing others based on race, Chavez would expect the human resources coordinator to conduct an investigation in conjunction with the hiring manager. Chavez would not exclude the human resources coordinator from the investigation, even if the human resources coordinator were one of the parties being harassed or discriminated against.

In addition to Chavez's deposition testimony, Mabin submitted portions of her deposition testimony and additional documents to support the undisputed facts above.

Reply and Trial Court Ruling

KHOI and Chavez filed a reply. A hearing was held on February 23, 2015, and the trial court took the matter under submission. On May 29, 2015, the trial court granted the motion for summary judgment. The court found there were no triable issues of fact as to the cause of action for discrimination for several reasons. Mabin had failed to dispute the evidence that she was not employed by KHOI, and the Doe amendment did not create a triable issue of fact on that issue. There was no evidence that Chavez could be held individually liable for discrimination, retaliation, or constructive discharge. The incidents, comments, and anonymous notes that Mabin described do not constitute actionable harassment, so there was no triable issue of fact as to whether she suffered an adverse employment action.

In addition, the court found the conduct was not sufficiently severe or pervasive so as to alter the conditions of Mabin's employment and create an abusive working environment. The only comments directed to Mabin were the ones made by Patty. The comment made during the prayer circle was not directed at Mabin and appears to have been an isolated incident. The anonymous notes were made over the course of several months, provided to Mabin in her role as human resources coordinator, and concerned comments made by another employee. The author of the anonymous notes did not express any racial animus personally. In fact, the author expressed positive statements about Mabin. Mabin did not submit evidence showing she was subjected to severe or pervasive conduct. The court found no triable issue of fact that Chavez's conduct was outrageous. There was also no evidence that Mabin's working conditions were so intolerable or aggravated that a reasonable person would be compelled to resign. The evidence showed Mabin continued to work at Kindred while she searched for another job for several months, which supported the inference that the employment conditions were not so intolerable a reasonable person would have to resign.

Judgment was entered in favor of KHOI and Chavez on July 31, 2015. Mabin filed a timely notice of appeal from the judgment.

DISCUSSION

Standard of Review

Appellate courts review orders granting summary

judgment de novo. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).) In performing this independent review, appellate courts apply the same three-step analysis as the trial court. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607.) First, the court identifies the issues framed by the pleadings. Second, the court determines whether the moving party has established facts justifying judgment in its favor. Finally, in most cases, if the moving party has carried its initial burden, the appellate court decides whether the opposing party has demonstrated the existence of a triable issue of material fact. (*Id.* at p. 1602.)

In our independent review, we consider the evidence in the light most favorable to the nonmoving party, liberally construing that party's evidentiary submissions, while strictly scrutinizing the moving party's evidence and resolving any evidentiary doubts or ambiguities in the losing party's favor. (*Saelzler*, *supra*, 25 Cal.4th at pp. 768–769.)

Harassment under the FEHA

Mabin contends triable issues of fact exist as to whether she suffered harassment based on her race that was sufficiently severe or pervasive as to alter the terms and conditions of her employment at Kindred. We conclude employee complaints that Mabin received in her role as human resources coordinator did not constitute harassment. Assuming a trier of fact could reasonably find Chavez's comments prohibited Mabin from investigating employee complaints, his personnel decisions did not constitute harassment. As a matter of law, the conduct at issue was not sufficiently severe or pervasive as to alter the

terms and conditions of Mabin's employment.

A. General Law

The FEHA prohibits an employer from discriminating against an employee because of race, national origin, or ancestry (§ 12940, subd. (a)), and prohibits an employer or any other person from harassing an employee because of race, national origin, or ancestry (*id.*, subd. (j)(1)). It is also an unlawful employment practice for any person to aid or abet harassment. (*Id.*, subd. (i).)

"The FEHA imposes two standards of employer liability for . . . harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040–1041 (*Health Services*).) An employer is vicariously and strictly liable for harassment by a supervisor. (*Ibid.*) "The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. (§ 12940, subd. (j)(1).)" (*Health Services*, *supra*, 31 Cal.4th at p. 1041.)

The employer must "take all reasonable steps necessary to prevent discrimination and harassment from occurring." (§ 12940, subd. (k).) A plaintiff cannot maintain a cause of action for failure to investigate or prevent harassment, however, unless there was actionable harassment. (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1315.)

To prevail on a claim of hostile work environment due to racial harassment, the employee must show the conduct at issue

was so severe or pervasive as to alter the conditions of employment and create an abusive work environment because of race. (See *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 278–279 (*Lyle*).) To avoid summary judgment, the plaintiff must show: (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment subjectively and objectively; (3) the harassment was based on her race; (4) the harassment unreasonably interfered with her work performance by creating an intimidating, hostile, or offensive working environment; and (5) there is a basis for employer liability. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 (*Fisher*).)

California courts interpreting the FEHA are often guided by federal court decisions interpreting Title VII of the federal Civil Rights Act (42 U.S.C. § 2000e–2(a)(1)), but only when the provisions are similar. (*Health Services*, *supra*, 31 Cal.4th at p. 1040.) "[E]xplicit differences between federal law and the FEHA 'diminish the weight of the federal precedents.' [Citation.]" (*Ibid.*) We give less weight to federal precedents concerning harassment, because the FEHA provisions are significantly different from Title VII. (*Health Services*, *supra*, 31 Cal.4th at p. 1040.)

B. Conduct Constituting Harassment

We must first determine what harassing conduct supports Mabin's claim. Not all of the conduct alleged in Mabin's complaint constituted harassment, and the circumstances under which a plaintiff may rely on conduct directed toward other

employees to support a harassment claim are limited.

Harassment is verbal, visual, or physical conduct that communicates an offensive message to an employee based on a protected category and is unnecessary to job performance. (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 951 (*Rehmani*).) Verbal harassment includes epithets, derogatory comments, or slurs based on race; physical harassment includes any physical interference with normal work or movement directed at an individual on the basis of race; and visual harassment includes derogatory posters, cartoons, or drawings on the basis of race. (Cal. Code Regs., tit. 2, § 11019, subd. (b)(2)(A), (B) & (C); see *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461 (*Miller*).)

"Harassment is distinguishable from discrimination under the FEHA. '[D]iscrimination refers to bias in the exercise of official actions on behalf of the employer, and harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace.' (*Roby v. McKesson, Corp.* [(2009) 47 Cal.4th 686, 707 (*Roby*)].) As our high court explained in *Reno v. Baird* [(1998) 18 Cal.4th 640], 'Harassment claims are based on a type of conduct that is avoidable and unnecessary to job performance. No supervisory employee needs to use slurs or derogatory drawings, to physically interfere with freedom of movement, to engage in unwanted sexual advances, etc., in order to carry out the legitimate objectives of personnel management. Every supervisory employee can insulate himself or herself from claims of harassment by refraining from such conduct. An individual supervisory employee cannot, however, refrain from engaging in the type of conduct which could later give rise to a discrimination claim. Making personnel decisions is an inherent

and unavoidable part of the supervisory function. Without making personnel decisions, a supervisory employee simply cannot perform his or her job duties.' (*Reno v. Baird*, *supra,* 18 Cal.4th at p. 646, quoting *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63–65 (*Janken*).)" (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869–70.)

Common personnel management actions that are necessary to carry out the duties of business and personnel management "may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management." (*Reno v. Baird*, *supra*, 18 Cal.4th at pp. 646–647.) A single act can constitute both discrimination and harassment, however, and the two claims may be supported by overlapping evidence, such as when a supervisor uses official actions as a means to convey the supervisor's offensive message. (*Roby, supra,* 47 Cal.4th at pp. 708–709.)

Federal courts have concluded that the perpetrator does not need to have intended the plaintiff to see or hear the offensive conduct. (*E.E.O.C. v. PVNF, L.L.C.* (10th Cir. 2007) 487 F.3d 790, 798 [e-mail containing offensive comments about plaintiff that were made by her subordinate to a coworker, which she read when she accessed a supervisor's account without permission, could be considered in evaluating the totality of the circumstances]; *Herrera v. Lufkin Industries, Inc.* (10th Cir. 2007) 474 F.3d 675, 680–681 [numerous references to plaintiff as "the fucking Mexican" made outside plaintiff's presence, but relayed to him by other employees, considered in the totality of the

circumstances]; *Hawkins v. Anheuser-Busch, Inc.* (6th Cir. 2008) 517 F.3d 321, 335–336 [evidence of racist conduct directed at others or occurring outside the plaintiff's presence, which plaintiff became aware of during the course of employment, may be considered in evaluating the totality of the circumstances].)

A plaintiff may have a claim for racial harassment under the FEHA based on conduct directed at other employees, but the absence of direct harassment affects the showing that the plaintiff must make. (*Lyle*, *supra*, 38 Cal.4th at p. 284.) "To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. (*Fisher*, *supra*, 214 Cal.App.3d at p. 611.) The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect . . . her perception of the hostility of the work environment.' (*Beyda v. City of Los Angeles* [(1998)] 65 Cal.App.4th [511,] 519 [(*Beyda*)].)" (*Lyle*, *supra*, 38 Cal.4th at p. 285, fn. omitted.)

Evidence of harassing conduct toward other employees that was not personally witnessed by the plaintiff has been found relevant to a plaintiff's perception of a hostile workplace if the plaintiff was otherwise aware of it. (*Beyda*, *supra*, 65 Cal.App.4th at pp. 519–521.) Our Supreme Court, however, expressly declined in *Lyle* to address whether "a reasonable person may be affected by knowledge that other workers are being sexually harassed in the workplace, even if he or she does not personally witness that conduct" (*Beyda*, *supra*, 65 Cal.App.4th at p. 519), because the plaintiff in *Lyle* had personal knowledge of the incidents at issue. (*Lyle*, *supra*, 38 Cal.4th at p. 285, fn. 7.) The *Beyda* court cautioned that "mere workplace

gossip" about the harassment of others is not a substitute for evidence, and the plaintiff's awareness of the harassment of others is subject to the limitations of the hearsay rule. (*Beyda*, *supra*, 65 Cal.App.4th at p. 521.)

In *Brennan v. Townsend & O'Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, 1359, the appellate court held that the plaintiff could not rely on harassing conduct against other employees which did not occur in her presence or immediate work environment, and which she was not aware of until she decided to investigate whether other incidents had occurred.

1. No Conduct by Empeno

In evaluating Mabin's harassment claim, we must first clarify that certain conduct is not at issue. Mabin has not shown any conduct by Empeno created a hostile work environment. Mabin has presented no evidence that the statements attributed to Empeno in anonymous letters and conversations that employees described were actually made. Mabin did not personally witness any offensive conduct by Empeno, and she did not submit any admissible evidence of offensive statements or actions by Empeno of which she had knowledge during her employment. For example, there is no evidence of a petition or any action by nurses seeking to replace Mabin or Levasseur. Mabin cannot show any conduct by Empeno created a hostile work environment for Mabin.

2. Employee Complaints

We hold the complaints that employees made to Mabin in

her role as the human resources coordinator did not constitute actionable harassment as to Mabin. Employees were expected to report complaints about discrimination or harassment to the human resources coordinator. In this case, anonymous letters stating concerns about offensive statements were left for certain employees to discover. The employees who received the anonymous letters complained by giving the notes to Mabin in her capacity as the human resources coordinator. The employees who gave the anonymous letters to Mabin did not engage in any harassing conduct. Similarly, the employees who spoke with Mabin to complain about workplace interactions with other employees did not engage in harassing conduct.

The terms and conditions of Mabin's job duties required her to receive and address employee complaints, including complaints about workplace discrimination and harassment. Receipt of the employee complaints in this case fell squarely within Mabin's job duties and was not harassing conduct on the part of the employees who made the complaints. There is no evidence that the employees who complained to Mabin engaged in any harassing conduct as to Mabin. Although there may be circumstances under which an employee's complaints constitute offensive or harassing conduct, there is no evidence in this case that the complaints fell outside the scope of Mabin's job. We conclude, and the dissent expressly agrees, Mabin's review of employee concerns and complaints did not constitute harassment of Mabin.

3. Chavez's Actions

Mabin asserts a reasonable trier of fact could find Chavez's

instruction not to harass the nurses prevented Mabin from conducting any investigation into employee complaints or addressing harassment in the workplace. She further contends Chavez's response, his refusal to authorize time off for classes, and his attempt to change her work location constituted harassment, creating a hostile work environment. We need not decide whether Chavez prohibited Mabin from investigating complaints, because even assuming a reasonable trier of fact could find that he did, there is no evidence Chavez's conduct harassed Mabin or created a hostile work environment on the basis of her race.

a. Failure to Investigate Complaints

We first address Mabin's contention that Chavez failed to investigate the complaints of other employees and prevented her from investigating their complaints. Even assuming Chavez instructed Mabin not to investigate the complaints that she brought to his attention, his instructions did not constitute harassing conduct on the basis of race. No reasonable trier of fact could conclude from the evidence in this case that Chavez prevented the investigation of complaints because of Mabin's race. Chavez was instrumental in hiring Mabin and gave her consistently positive reviews. There is no direct or indirect evidence that he prevented Mabin from doing her job to investigate complaints because of her race. The undisputed evidence was that Chavez gave Mabin the same instruction not to harass his nurses in every situation, regardless of race. Chavez prevented Mabin from correcting licensing issues with 64 nurses. There is no evidence that the race of the nurses had anything to

do with his decision. There is simply no evidence that Chavez failed to investigate complaints or prevented Mabin from doing her job because of the race of any of the employees involved.

Mabin suggests that a supervisor's failure to investigate complaints itself can be considered harassment that contributes to a hostile work environment. For 20 years, California law has recognized that a supervisor's failure to address employee complaints is a personnel decision, not harassment. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 (*Fiol*).) "A non-harassing supervisor who fails to take action on a sexual harassment complaint by a subordinate has not engaged in personal conduct constituting harassment, but rather has made a personnel management decision which in retrospect may be considered to be inadequate or improper." (*Ibid.*)

If a supervisor harasses an employee, or aids and abets the harassment of an employee, that supervisor is personally liable for money damages, and the employer is vicariously and strictly liable for the conduct of the harassing supervisor. (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.) A supervisor's mere knowledge that harassment is taking place and failure to prevent it is not "aiding and abetting." (*Id.* at p. 1326.) A non-harassing supervisor who fails to take action to prevent harassment is not personally liable for harassment under the FEHA as an aider and abettor of the harasser, an aider and abettor of the employer, or an agent of the employer. (*Id.* at p. 1331.)

"Sound policy reasons exist for treating such a non-harassing supervisor differently than a harassing supervisor. Individual supervisory employees should be placed at risk of personal liability for personal conduct constituting sexual harassment, either directly as the actual harasser or indirectly as

an aider and abettor of the harasser. Such individual supervisory employees should not be placed at risk of personal liability, however, for personnel management decisions which have been delegated to the supervisor by the employer, such as deciding whether to investigate or take action on a complaint of sexual harassment." (*Fiol*, *supra*, 50 Cal.App.4th at pp. 1327–1328.)

Even if Chavez can be found to have instructed Mabin not to investigate complaints that she received from employees, his instructions did not constitute harassment creating a hostile work environment for her. His decision not to investigate complaints may have been improper or inadequate, leaving the employer open to liability on legitimate claims of discrimination and harassment, but his instruction to take no action on complaints was not itself harassing conduct. An employer's failure to take action does not create a hostile work environment. A hostile work environment must exist before the employer can be found liable for failing to prevent it. If the complaints that Mabin reviewed in the course of her job did not constitute harassment, then Chavez's instruction to take no action in response to those complaints did not constitute harassment.

Mabin also contends that Chavez failed to investigate complaints that she made on her own behalf, and that as to her own complaints, no action was taken. As stated above, a supervisor's inaction is not harassment. There is no evidence from which a trier of fact could reasonably conclude Chavez intended through his inaction to communicate an offensive message on the basis of Mabin's race. If the conduct that she complained of to him constituted actionable harassment, then Chavez's inaction could be a basis of liability for the employer,

but his failure to investigate her complaints did not independently constitute harassment.

b. Attempted Relocation

Mabin contends Chavez's direction to work full time at Tri-City was harassing conduct that contributed to a hostile work environment. Viewing the evidence in the light most favorable to Mabin, a trier of fact could not reasonably find harassment. Mabin discovered 64 nurses were not properly licensed, but there is no evidence in the record of the race of the employees. Chavez interfered with Mabin's investigation of the licensing issues. He said he wanted her to work full time at Tri-City, because the nurses were unhappy with her. All employees worked at both locations, and there is no evidence of the race of the nurses who spoke with Chavez. When Mabin refused to relocate, Chavez stated that he wanted Mabin or her assistant to work full time at Tri-City. Mabin accused her supervisors of capitulating to employees who wanted to get rid of her, but this speculation was based solely on the anonymous letters, in which one anonymous employee expressed approval of Mabin's job performance and attributed race-based statements to one other employee. Ultimately, Mabin was not required to work full time at Tri-City or change her hours in any way. As a matter of law, Chavez's attempt to relocate Mabin because the nurses were unhappy with her, which was quickly countermanded and never implemented, did not constitute severe or pervasive conduct.

We note that even were we to conclude a triable issue of fact exists as to whether Chavez's relocation decision constituted harassment, as a matter of law, Mabin's employer responded to

her complaint on this issue promptly with appropriate corrective action by denying the relocation request.

c. Other Conduct

Mabin contends Chavez's refusal to authorize her to leave early to take a class and his interference with her investigation of licensing issues was harassment based on her race as well. There is no evidence that Chavez refused to allow her to leave early based on her race. The evidence showed he allowed another employee to leave early for classes, but that employee had very different job duties and was not a management level employee. No trier of fact could reasonably conclude that Chavez denied Mabin time off to take a class based on her race. There is also no evidence from which a trier of fact could reasonably conclude that Chavez interfered with her resolution of licensing issues based on her race or the race of any of the nurses with licensing issues. Chavez's actions with respect to these issues were personnel decisions that did not constitute harassing conduct.

C. Totality of the Circumstances

Setting aside the complaints made by third parties and Chavez's failure to investigate complaints, there is little evidence of harassing conduct directly experienced by Mabin.

Not all workplace harassment will give rise to a FEHA violation. "Whether the conduct of the alleged harassers was sufficiently severe or pervasive to create a hostile or abusive working environment depends on the totality of the circumstances. ""These may include the frequency of the

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" [Citations.]" (*Rehmani*, *supra*, 204 Cal.App.4th at pp. 951–952.)

"'"[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' [Citation.] . . . [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81–82; see also *Beyda*[, *supra*,] 65 Cal.App.4th [at pp.] 517–518.)' (*Miller*, *supra*, 36 Cal.4th at p. 462.)" (*Lyle*, *supra*, 38 Cal.4th at p. 283.)

"With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. [Citations.] That is, when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions. (See *Herberg v. California Institute*

of the Arts (2002) 101 Cal.App.4th 142, 150–153 [liability for sexual harassment may not be imposed based on a single incident that does not involve egregious conduct akin to a physical assault or the threat thereof]; *Walker v. Ford Motor Co.* (11th Cir. 1982) 684 F.2d 1355, 1359 [involving racial harassment consisting of racial slurs and racially offensive comments]; *Minority Police Officers Ass'n of South Bend v. City of South Bend* (N.D. Ind. 1985) 617 F.Supp. 1330, 1353 [same].) Moreover, when a plaintiff cannot point to a loss of tangible job benefits, she must make a "'commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.'" [Citation.]" (*Lyle*, *supra*, 38 Cal.4th at pp. 283–284.)

In the context of sexual harassment claims, the *Lyle* court observed that "sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. (See *Gleason v. Mesirow Financial Inc.* (7th Cir. 1997) 118 F.3d 1134, 1144 ['the impact of "second-hand harassment" is obviously not as great as the impact of harassment directed at the plaintiff']; *Black v. Zaring Homes, Inc.* (6th Cir. 1997) 104 F.3d 822, 826 [fact that most comments were not directed at the plaintiff weakened her harassment claim]; [citation].) A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' (*Fisher*, *supra*, 214 Cal.App.3d at p. 610.)" (*Lyle*, *supra*, 38 Cal.4th at pp. 284–285.)

The only evidence of harassment directed at Mabin that she witnessed personally took place early in her employment. Her co-worker Patty made disrespectful and harassing statements on two occasions by referring to Mabin as a little gal, threatening to ignore Mabin's directives, and stating that she was going to quit because Kindred was hiring too many Black employees. Patty was not Mabin's supervisor, however. There is no evidence in the record as to whether Patty quit, but for the year following these incidents, Mabin did not experience any further harassment from Patty.

Mabin also witnessed harassing conduct directed toward a Black co-worker in connection with a prayer circle, after she had already begun searching for a new job. Conduct directed at a third party is considered less severe than conduct experienced directly. Mabin addressed the incident in her professional capacity and handled the matter effectively. There were no further reports of harassment or discriminatory conduct by this nurse.

Even were we to consider Chavez's attempt to relocate Mabin as communicating an offensive message on the basis of Mabin's race, the totality of the circumstances in this case do not support an actionable harassment claim. Two incidents with Patty early in her career, an attempted relocation that was rescinded and never implemented, and one incident with a different coworker after she had already begun looking for a new job are insufficient as a matter of law to constitute a hostile work environment based on race. In the absence of harassing conduct so severe or pervasive as to alter the conditions of employment, we do not reach the question of whether the employer failed to prevent harassment on the basis of race.

Discrimination

Mabin contends a triable issue of fact exists as to whether she was discriminated against on the basis of her race, because allowing a hostile work environment can be an adverse employment action supporting a claim of race discrimination. To establish a prima facie case of discrimination for purposes of summary judgment, "the plaintiff must provide evidence that (1) the plaintiff was a member of a protected class, (2) the plaintiff was qualified for the position he or she sought or was performing competently in the position held, (3) the plaintiff suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests a discriminatory motive. [Citation.]" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004.) Since we have concluded that no triable issue of fact exists as to harassment, no triable issue of fact exists as to whether Mabin suffered an adverse employment action.

We note that Chavez's instructions not to harass the nurses during investigations, his request that Mabin work full time at Tri-City which was not authorized by Sopko and never implemented, and Chavez's refusal to allow Mabin to leave work early for classes did not amount to adverse employment actions.

Intentional Infliction of Emotional Distress

Mabin also contends Chavez's conduct in permitting a hostile work environment and failing to investigate harassment constituted intentional infliction of emotional distress. "'[T]o

state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.) 'Conduct, to be '"outrageous"' must be so extreme as to exceed all bounds of that usually tolerated in a civilized society.' (*Ibid*.)" (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259.) Since we find no triable issue of fact with respect to harassment, there is no triable issue of fact as to intentional infliction of emotional distress for permitting harassment.

Constructive Discharge

Mabin contends triable issues of fact exist as to whether she was constructively discharged. We disagree.

"[T]o establish a constructive discharge, an employee must plead and prove . . . that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (*Turner*).)

An employee may not simply '"quit and sue,"' claiming to have been constructively discharged. (*Turner*, *supra*, 7 Cal.4th at

p. 1246.) The facts must support a finding that the resignation was "coerced," rather than "simply one rational option for the employee." (*Ibid.*) "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." (*Ibid.*) Moreover, "the cases are in agreement that the standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' [Citation.]" (*Id.* at p. 1248, quoting *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 212.)

As discussed above, there was no triable issue of fact as to a hostile work environment. In addition, the evidence showed Mabin searched for a new job for several months, and accepted a new job which offered a substantially higher salary. There was no triable issue of fact as to whether Mabin was forced to resign because of her working conditions. The trial court properly granted summary judgment.

DISPOSITION

The judgment is affirmed. Respondents Kindred Heathcare Operating, Inc. (KHOI) and Kevin Chavez are awarded their costs on appeal.

KRIEGLER, Acting P.J.

I concur:

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Starla Mabin v. Kindred Healthcare Operating, Inc,. et al.
B265712

BAKER, J., Dissenting

Beginning with areas of agreement is often a good idea. The majority and I agree plaintiff Starla Mabin was directly subjected to "disrespectful and harassing statements" attributable to her race (she is Black) on two occasions while working at hospitals overseen by defendant Kevin Chavez.[1] The majority and I also agree Mabin witnessed or was made aware of other offensive statements and conduct concerning Black employees at the hospitals—who on one occasion were referred to as "ugly niggas." The majority and I further agree that a human resources coordinator responsible for receiving complaints of workplace harassment (as Mabin was) cannot prevail on a racially hostile work environment claim merely by presenting evidence that she was adversely affected by reviewing complaints

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[1] Like the majority, I focus on the merits of Mabin's hostile work environment claim in the discussion that follows. Regardless of whether defendant KHOI is the correct entity defendant, or whether she instead should have sued KND Development 53, LLC, we will have to decide the merits of this dispute sooner or later. Later, as to the hospital entity defendant, because Mabin amended her complaint to name KND Development 53, LLC as a defendant and proceedings against that defendant will likely come before us on appeal in due course. Sooner, as to defendant Chavez, because he can be liable on a hostile work environment theory of discrimination regardless of whether the correct entity is named in the complaint.

of racial harassment that came to her in the course of performing her duties. But the agreement ends just about there.

The reason the majority gives for denying Mabin a trial and granting judgment for defendants is its view that the racial harassment she suffered was insufficiently severe and pervasive. That rationale suffers from two problems.

The first is common enough. Instead of construing the evidence in the light most favorable to Mabin and drawing reasonable inferences in her favor, the majority opinion does the opposite. The second problem, on the other hand, is more novel. The majority opinion proceeds to a significant extent on the understanding Mabin would seek to prove she suffered harassment in reviewing the content of certain anonymous reports of racial animus, which cannot be a basis for liability because it was her job to review such reports. That misunderstands the nature of Mabin's hostile work environment claim. Mabin seeks to prove—with ample evidentiary basis—that defendant Chavez's direction to refrain from investigating many of the anonymous reports and his attempt to transfer her to another hospital, when combined with the aforementioned disrespectful and harassing statements, fostered a hostile environment in which a reasonable person in her position would believe employees could call Blacks niggers and try to drum them out of the workplace with impunity. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283 (*Lyle*); *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263-264 [whether abusive working environment exists "must be assessed from the 'perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff'"].) Mabin should have the opportunity to make that case at trial.

I

The rules that govern review of a grant of summary judgment are well-known (see generally *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 856), but the majority opinion does not apply them when resolving two important questions: (1) whether defendant Chavez, the Chief Executive Officer of the South Bay and Tri-City hospitals, directed Mabin not to investigate or take remedial action in response to evidence of racial animus in his hospitals; and (2) what inference should be drawn from defendant Chavez's attempt to reassign Mabin to work at another hospital.

A

In October 2011, Chief Operating Officer (COO) Jude Levasseur (also Black) brought Mabin an anonymous note he received. The note's author stated she heard a nursing supervisor named Zenia Empeno say she "hate[s] black people and she is going to get all black people fire[d] or make them quit." The note further revealed Empeno said "nothing is going to happen to her . . . because they have the Phillipino Maphia [*sic*] here at this place and she want[s] it to be all of us again and no more black people." According to the note, Empeno "sa[id] you guys [i.e., Mabin and other Black employees] are all ugly niggas and you need to go."

Mabin forwarded the note to defendant Chavez, and she did so because that was established protocol. As defendant Chavez conceded during his deposition, "[Mabin's] responsibility is, any time that there is any complaint, that [she] would inform me,"

and she would do so "prior to any investigation being undertaken."

During Mabin's deposition, she described what happened after she made defendant Chavez aware of the "ugly niggas" note:

> Q Did you ever have a conversation with [Empeno] about what this person is saying she allegedly said?
>
> A No, as directed not to.
>
> Q Who directed you not to?
>
> A [Defendant Chavez]
>
> Q What did he tell you?
>
> A Not to harass his nurses.
>
> Q Did [defendant Chavez] specifically tell you that he didn't want you to talk to [Empeno] about what had been said in [the note]?
>
> A When I had a—when I sent the email out and nothing was done, I told [defendant Chavez] that I was going to speak with [Empeno] myself. And [defendant Chavez's] response was, 'Well, I don't want you to harass my nurses.' He said that about everything, don't harass his nurses.

Defendant Chavez's deposition testimony directly conflicts with this testimony by Mabin. When shown a copy of the note and asked what his reaction would be upon seeing that type of document, defendant Chavez testified, "I would meet with the HRC [i.e., Mabin] and have her conduct an investigation."

This is a dispute of material fact that should be resolved at trial. Viewed in the light most favorable to Mabin, the evidence is sufficient to permit a jury to conclude defendant Chavez prevented her from investigating or pursuing remedial action in

response to the "ugly niggas" note—indeed, Mabin understood his command in precisely that manner.

B

A few months later, in March 2012, COO Levasseur received another anonymous note. It stated Empeno was "organizing the night nurses . . . to get you [Levasseur] and [Mabin] the HR Lady out of this place." The note went on to state Empeno had travelled to the Philippines "so that no one will know that she is part of the plan to remove black people out of this place."

Mabin again forwarded the note to defendant Chavez. In her cover email attaching a copy of the note, Mabin noted "it is very apparent that racism currently exists in the work place." Mabin also placed the note in the context of the workplace harassment she had experienced herself: "In the past I have encountered underhanded disrespect from being called a 'lil girl' or that 'gal' from a manager. When I reported the behavior I was simply told to continue to work with her [the manager]. The [manager] never received any sort of write up for her behavior."

During her deposition, Mabin was asked whether she spoke to Empeno about the issues raised in the March 2012 anonymous note. She answered, "whenever there was nothing done, I told [defendant Chavez] I would just speak to the nurses myself. And his response as always is, don't harass his nurses." Apparently believing Mabin's answer was nonresponsive, defendants' attorney again asked Mabin whether she spoke to Empeno about the statements attributed to her in the March 2012 note. Mabin again explained her answer was "no" because she "was advised not to."

This is again evidence on which a jury could rely to conclude defendant Chavez prevented an investigation when confronted with evidence that one or more employees at his hospitals were planning "to remove black people out of this place."

C

A month later in April 2012, after being made aware of the aforementioned notes, defendant Chavez called Mabin into a meeting with the hospital management team. According to Mabin, defendant Chavez said he wanted her to move from working primarily at the South Bay hospital to working full-time at the Tri-City hospital. Mabin objected, believing there was no need for her to work full time at the Tri-City hospital.

After the meeting, Mabin contacted the manager of the Tri-City hospital and asked whether there was a need to have a human resources presence at that hospital five days a week. The manager said no. Mabin conveyed this information to District Director for Human Resources Jeffrey Sopko (also one of her bosses), and Sopko informed her she did not have to accept the reassignment. Mabin then sent defendant Chavez an email notifying him of Sopko's decision, and at about the same time, she also sent Sopko an email explaining why she would rather quit than move locations: "According to the letters that [were] recently received, the goal for some employees is to make 'the black managers leave South Bay' . . . . making me move to Tri City will give the [disgruntled] employee[s] just what they want. Is that the real reason why it is such a big deal to move me to T.C.; to make some of the employee[s] happy?" According to Mabin, defendant Chavez later confirmed that was indeed the

reason—she testified at her deposition that he personally told her "'my nurses aren't happy with you here and I don't want to make my nurses unhappy, and I really want you just to go out and work at Tri-City.'"[2]

Considering this evidence, a factfinder could infer defendant Chavez sought to move Mabin to another work assignment to placate those harboring racial animus against Black employees. Indeed, so far as the record before us reveals, defendant Chavez offered no alternative (non-pretextual) explanation for attempting to move Mabin.

D

When viewed through the requisite summary judgment lens, these are not the only incidents that could lead a factfinder to conclude defendant Chavez prevented Mabin from taking action to address racial animus and harassment in the workplace. Mabin, for instance, received another complaint from a Black employee about Empeno several months later, on or about September 4, 2012. According to the complaint, Empeno told the employee "people like you are always mad and I know your type," adding that she "[knew] how to get people fired and you can remember it."

Mabin advised defendant Chavez and others of the employee's complaint via an email in which she explained she "had numerous complaints about [Empeno] and her level of professionalism," and that "[a]ll of the complaints have come from African American employees." Mabin advised defendant Chavez and the other email recipients of what she intended to do: "I

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[2] Ultimately, Sopko's decision carried the day and Mabin was not required to work full-time at Tri-City hospital.

have had enough of her [antics] and attitude. I am going to speak with her this week. Any other company she would have been terminated or at least investigated but nothing was ever said to her about her unprofessional behavior[,] and to make matters worse that is the night supervisor . . . ."

During her deposition, Mabin testified defendant Chavez came to speak to her after she sent this email and told her not to speak to Empeno. Mabin also explained that his direction not to speak with Empeno on that occasion was consistent with "all the times he would tell me not to harass his nurses." Mabin further explained why she believed defendant Chavez's obstruction of remedial action, in conjunction with the direct harassment she suffered, constituted racial harassment: "When I—when I spoke with [defendant Chavez], in terms of the accusations that were made against me, calling me the N word, the—the letters that I was receiving, he overlooked it. He told me to deal with it. I mean, he totally just disregarded the claims and the issues that were brought to his attention as well. He told me, 'Too bad.' [¶] I remember having a conversation with [defendant Chavez] once, and he said, 'Well, that's too bad, you just have to deal with it.' So in my mind when someone brings to you a situation or a problem and as a CEO that's your response, then that lead—that leads me to believe that he is agreeing to the—the bad behavior." Viewed in the light most favorable to Mabin, these again are facts inconsistent with the view that defendant Chavez did not prevent investigation of complaints of harassment against Black employees.

It is true that Mabin in at least one other instance *was* able to address harassment of Blacks in the workplace, namely when she reprimanded an employee who did not want to touch the

hand of a fellow employee who is Black. But so far as the record before us reveals, that incident occurred in Mabin's presence and it was not one about which she was obligated to—or did—inform defendant Chavez. Thus, while Mabin was not entirely foreclosed from investigating racial harassment, that does not detract from the facts she put forward to prove that in many instances she was. As Mabin testified during her deposition, "Any time I received a complaint, there was an investigation unless I was told by [defendant Chavez] not to harass his nurses."

E

Perhaps a jury would not find Mabin credible. Perhaps defendant Chavez has a countervailing explanation for the evidence summarized in this dissent. But these are factual questions to be decided at a trial. For purposes of review upon a grant of summary judgment for defendants, we must proceed on the understanding that defendant Chavez blocked investigations into racial animus in his hospitals and attempted to transfer Mabin to another location to mollify employees who harbored such animus.[3] (See, e.g., *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470 ["We stress that, because this is an appeal from a grant of summary judgment in favor of defendants, a reviewing court must examine the evidence de novo and should draw reasonable inferences in favor of the nonmoving party"].)

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[3] The majority appears to fault Mabin for the absence of further evidence to prove the events described in the anonymous notes occurred. Of course, the theory of her case is that defendant Chavez blocked any contemporaneous investigation or remedial action, either of which may have uncovered precisely such evidence.

II

To prevail on her racially hostile work environment claim, Mabin must be able to show she was a member of a protected class, that she was subjected to harassment based on race, and that the harassment unreasonably interfered with her work performance by creating a hostile or offensive work environment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.) To show she was subjected to a hostile environment, Mabin must establish racially harassing conduct was "'sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment . . . .' [Citation.]" (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130.)

As stated at the outset, the majority and I agree Mabin was subjected to some harassing conduct, namely, the "lil girl" and "hiring too many Black people" comments made to her by another employee who was the acting Chief Operating Officer at the time. (See *Ash v. Tyson Foods, Inc.* (2006) 546 U.S. 454, 456 [use of term "boy" to describe Black male employees can be evidence of discriminatory animus].) The majority, however, believes that is the sum total of harassing conduct relevant to its analysis because it "set[s] aside the complaints made by third parties" and "Chavez's failure to investigate complaints." This incorrectly disregards legitimate evidence that would support Mabin's hostile work environment claim. Defendant Chavez's direction not to investigate reported harassment of Black employees and his attempt to transfer Mabin to another hospital after being informed of animus against her and other Black employees should be part of the "constellation of surrounding circumstances" that a court ruling on summary judgment (and a jury deciding

matters of fact at trial) must assess. (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81-82.)

The argument made for setting aside evidence of defendant Chavez's conduct rests on citation to a Court of Appeal decision, *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 (*Fiol*). The majority in that case (over a lengthy dissent by this division's presiding justice) held that a "mere failure to act" on a complaint of sexual harassment by a "nonharassing supervisor" does not subject the supervisor to personal liability. (*Id.* at pp. 1322, 1326.) The differences between *Fiol* and this case are readily apparent. Mabin's evidence opposing summary judgment indicates defendant Chavez was not guilty of a mere failure to take action when made aware of evidence of a racially hostile work environment. (*Id.* at p. 1322 ["[F]iol complained to Doellstedt of Silva's sexual harassment. . . . Nothing was done to investigate Fiol's sexual harassment complaints against Silva or control Silva's behavior"].) Rather, and drawing reasonable inferences in Mabin's favor, defendant Chavez affirmatively blocked her efforts to investigate the various reported incidents[4] and he at least tacitly approved of those harboring animus against Blacks by attempting to transfer Mabin to another worksite. In other words, the evidence takes defendant Chavez's

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[4] In a very concrete and immediate sense, defendant Chavez's instruction not to investigate animus and harassment against Black employees "adversely affected [Mabin's] ability to do . . . her job." (*Davis v. Monsanto Chem. Co.* (6th Cir. 1988) 858 F.2d 345, 349.)

conduct out of the "mere inaction" category and a jury could reasonably conclude he was not just a nonharassing supervisor.[5]

That is not to say, of course, that defendant Chavez's conduct alone would be sufficient to establish a triable issue of fact on the severe and pervasive element of a racially hostile work environment claim. Instead, it is the "lil girl" and "hiring too many Black people" comments directed at Mabin *plus* defendant Chavez's conduct that must all be assessed to determine whether a hostile work environment existed. (See Gov. Code, § 12940, subd. (j)(1) ["Harassment of an employee . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action"]; *Bradley v. California Dept. of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1612, 1631 [most significant measure an employer can take in response to a harassment complaint is to launch a prompt investigation].) If a plaintiff cannot attempt to prove he or she was subjected to a racially hostile work environment in part through evidence the company's Chief Executive Officer not only tolerates but appeases those who reportedly want to rid the workplace of members of the plaintiff's

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[5] It is important to note that even on its own terms, the majority's rationale is necessarily limited to the parties now before us on appeal. The majority expressly recognizes defendant Chavez's "decision not to investigate complaints may have been improper or inadequate, leaving the employer open to liability on legitimate claims of discrimination and harassment . . . ." Thus, the result in this case does not control the outcome of the proceedings involving KND Development 53, LLC that remain pending in the trial court.

racial group, then something has gone wrong with our employment discrimination jurisprudence.

Considering all the evidence before us, the question of whether Mabin was subjected to a racially hostile work environment is, in my judgment, one of fact for a jury to decide. (*Nazir v. United Airlines, Inc.*, *supra*, 178 Cal.App.4th at p. 264 ["[T]he issue of whether an employee was subjected to a hostile environment is ordinarily one of fact"].) I respectfully dissent.

BAKER, J.